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No. 85-458

In the Supreme Court of the United States

OCTOBER TERM, 1985

RONALD A. SCHIAVONE AND SCHIAVONE CONSTRUCTION COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a private party has standing to seek the appointment of an independent prosecutor to investigate and prosecute offenses allegedly committed by a government informant before a federal grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 766 F.2d 70. The opinion of the district court (Pet. App. 13a-30a) is reported at 596 F. Supp. 1465.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1985 (Pet. App. 1a). The petition for a writ of certiorari was filed on September 16, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1984, petitioners filed an application in the United States District Court for the Eastern District of New York seeking the appointment of an independent counsel to investigate whether Mario Montuoro had testified falsely before a federal grand jury that had been

investigating possible wrongdoing by petitioners. Petitioners asked that the independent counsel be authorized to prosecute any violations of federal criminal law warranted by the investigation.[1] In support of their application, petitioners alleged that, in 1979, Montuoro, who had a prior criminal record, told federal agents that petitioner Ronald Schiavone and Raymond Donovan had made an illegal cash payment to a union officer at a luncheon in a New York City restaurant in May or June 1977. When Raymond Donovan became Secretary of Labor in 1981, a special prosecutor, Leon Silverman, was appointed to investigate Montuoro's allegation about the alleged payment. Montuoro repeated his allegation before a federal grand jury investigating the matter. The grand jury did not indict either petitioner Schiavone or Secretary Donovan.[2] In their application, petitioners claimed that Montuoro had committed several federal offenses: perjury (18 U.S.C. 1621), false declarations before a grand jury (18 U.S.C. 1623), false statements (18 U.S.C. 1001), obstruction of justice (18 U.S.C. 1505), and contempt (18 U.S.C. 401).[3] See Pet. App. 3a-4a, 14a-15a.

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[1]Petitioners' attorneys also offered to serve as independent counsel.

[2]The Special Prosecutor appointed to investigate Montuoro's allegations also did not officially recommend that the government charge Montuoro with any crime.

[3]Petitioners appended to their application affidavits by six so-called experts in professional responsibility who were of the opinion that the Department of Justice had not prosecuted Montuoro for his alleged false testimony because of a "conflict of interest." Pet. App. 31a-58a. These affiants generally advocated the appointment of an independent counsel to investigate the allegation of perjury and to prosecute Montuoro. None of the six affiants provided a statutory basis for appointing such a prosecutor. None commented on whether the courts have the inherent power to appoint independent prosecutors in the circumstances presented. None explained whether the appointment of an independent prosecutor by a district court would offend Article II of the Constitution or the separation of powers doctrine. And none addressed the question whether petitioners had standing to apply for the appointment of a special prosecutor.

2. The district court denied the application in a lengthy opinion. Pet. App. 13a-30a.[4] The court did not decide whether petitioners had standing to bring their suit. Pet. App. 29a. Instead, the court held that, for several reasons, it lacked the authority to appoint an independent prosecutor to investigate and prosecute any crimes that may have been committed by Montuoro.[5] To begin with, after reviewing the English common law and federal judicial decisions, the court found that it did not have the inherent authority to make such an appointment. *Id.* at 17a-20a.[6] The court also found no statutory authority for the relief requested by petitioners. *Id.* at 23a. As the court explained (*ibid.*), the Ethics in Government Act, 28 U.S.C. 591-598, which allows a division of the United States Court of Appeals for the District of Columbia, upon a request submitted by the Attorney General, to appoint a special prosecutor to investigate possible offenses committed by high-ranking government or presidential campaign officials, did not apply to Montuoro, since he did not hold any such office. The court also observed that "[i]f the power to appoint special prosecutors were inherent, then it would seem that the Ethics in Government Act was superfluous." Pet. App. 23a. Finally,

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[4]At a prior hearing on petitioners' application, the district court granted the government's motion for leave to intervene in the proceedings. Pet. App. 13a; 10/26/84 Tr. 29-30.

[5]The court also stated that it was "puzzled" by petitioners' request that their own counsel be considered for the position of independent prosecutor. Pet. App. 27a n.4.

[6]The court distinguished those cases permitting appointment of the attorney for one party to prosecute a criminal contempt occurring during the litigation and committed by the opposing party. See, *e. g.*, *Musidor B. V.* v. *Great American Screen*, 658 F.2d 60 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982). The court explained that this narrow exception provides no basis for appointing an independent counsel to prosecute crimes allegedly committed during a criminal investigation. Pet. App. 20a-21a.

the court held that separation of powers principles would be violated if the federal courts were to displace the Executive Branch from its exclusive responsibility over the initiation of criminal prosecutions by appointing an independent prosecutor over the objection of the Executive Branch. *Id.* at 23a-29a. The court concluded that the decision whether to investigate and prosecute Montuoro lay within the prerogative of the Executive Branch and therefore denied petitioners' application. *Id.* at 29a.

3. The court of appeals vacated the district court's order and dismissed petitioners' application on the ground that petitioners lacked standing to bring this suit. Pet. App. 1a-12a. Relying heavily on *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973), and *Leeke* v. *Timmerman*, 454 U.S. 83 (1981), the court of appeals held that petitioners lacked standing to invoke the judicial powers of the federal courts, because the injury that petitioners had allegedly suffered—damage to their reputations—stemmed from Montuoro's alleged perjury, not from the government's failure to prosecute Montuoro. Pet. App. 10a. Moreover, petitioners' injury could not be redressed by a criminal prosecution of Montuoro, the court explained, because a "[s]uccessful prosecution would only result in the jailing of Montuoro, not in financial recompense for [petitioners]." *Id.* at 10a-11a. Finally, the court rejected petitioners' claim that they had standing to vindicate the public interest in the administration of justice, on the ground that separation of powers principles foreclosed petitioners' claim to standing on that basis. *Id.* at 12a (citing *Allen* v. *Wright*, No. 81-757 (July 3, 1984)). Accordingly, the court held that petitioners lacked standing to apply to the district court for the appointment of an independent prosecutor and ordered that petitioners' application be dismissed. Pet. App. 12a.

ARGUMENT

It is a familiar and well settled principle that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. * * * [I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 619 (1973); accord, *Leeke* v. *Timmerman*, 454 U.S. 83, 85-87 (1981). This principle stems from the fact that "[c]riminal prosecutorial decisions vindicate only intangible interests, common to society as a whole, in the enforcement of the criminal law" since "[t]he conduct at issue has already occurred * * * [and] all that remains is society's general interest in assuring that the guilty are punished." *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985), slip op. 8 (Marshall, J., concurring in the judgment). Petitioners do not dispute this principle; rather, they claim (Pet. 8) that there are special factors in their case that exempt it from the general rule. However, none of these factors confers standing on petitioners.

First, petitioners claim (Pet. 9-14) that *Linda R.S.* and *Leeke* do not apply to this case because "the prosecutor's office is disabled by a conflict of interest from exercising prosecutorial discretion with regard to Montuoro's perjury against Petitioners."[7] This supposed conflict, they claim, arises because Montuoro has served as a government informant in the past. However, not only is this allegation

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[7]Petitioners incorrectly state (Pet. 7 (footnote omitted)) that the district court "accepted the postulate that the Department of Justice has a conflict of interest with regard to Montuoro." The court accepted no such postulate. Rather, the court began its discussion by observing that "[t]he [petitioners] leap from the conflict of interest postulate to the inherent power of the Court to appoint a special prosecutor to resolve the conflict." Pet. App. 17a.

of a conflict of interest baseless as a matter of law,[8] but also it has absolutely nothing to do with the question of standing, since a private citizen is not harmed by the government's decision not to file criminal charges, for whatever reason. *Linda R.S.*, 410 U.S. at 619. What is more, the question under Article III of the Constitution is whether the plaintiff has suffered injury to a judicially-cognizable interest, not whether the plaintiff is a qualified representative of the public interest. See *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12-13; *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982); *Sierra Club* v. *Morton*, 405 U.S. 727, 739-740 (1972). It necessarily follows that plaintiffs cannot obtain standing [redacted]based simply upon the allegation that they are a better champion of the public interest than someone else. Petitioners' argument is therefore misdirected.

Second, petitioners claim (Pet. 14-20) that *Linda R.S.* and *Leeke* are limited to those situations in which private citizens seek to compel a state prosecutor to investigate and prosecute state law offenses, whereas petitioners asked the district court to appoint an independent prosecutor to investigate and prosecute federal crimes. But that is a distinction without a difference. The Court's rulings in those cases was bottomed on the principle that a person, even if he is the victim of a crime, suffers no judicially-cognizable injury from the government's refusal to file criminal charges against the allegedly-responsible party. See *Leeke*, 454 U.S.

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[8]Petitioners' claim that the entire Department of Justice is disqualified from prosecuting an individual who has acted as a government informant is specious. See *United States* v. *Caggiano*, 660 F.2d 184, 191 (6th Cir. 1981), cert. denied, 454 U.S. 1149 (1982); *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 363 n.34 (S.D.N.Y. 1955). The central flaw in petitioners' claim is their failure to recognize that the Executive Branch and private attorneys are not similarly situated. See *Nevada* v. *United States*, 463 U.S. 110, 128, 135-138 n.15 (1983).

at 86-87; *Linda R.S.*, 410 U.S. at 619. That principle is fully applicable where the claim is that federal, rather than state, officials have refused to prosecute an alleged offender. See *Nathan* v. *Smith*, 737 F.2d 1069, 1078 (D.C. Cir. 1984) (Bork, J., concurring) (private citizens lack standing to seek a court order compelling the Executive Branch to conduct a preliminary investigation or to compel an application for appointment of independent counsel under the Ethics in Government Act, 28 U.S.C. 592); *Ramos Colon* v. *United States Attorney*, 576 F.2d 1 (1st Cir. 1978) (former criminal defendant lacks standing to seek the appointment of a special prosecutor to investigate alleged misconduct committed by the United States Attorney). Accordingly, *Linda R.S.* and *Leeke* make clear that, as a matter of law, petitioners lack a personal stake in the outcome of any investigation and prosecution of Montuoro.

Finally, petitioners contend (Pet. 21) that, unlike the situations in *Linda R.S.* and *Leeke*, in this case "there is a clear nexus between the injury suffered by Petitioners and the remedy they seek." That nexus, petitioners maintain (Pet. 21-22), stems from the fact that a government attorney vouched for Montuoro's credibility and from the conflict of interest that has allegedly disabled the government from investigating and prosecuting Montuoro. That claim also lacks merit. Neither assertion by petitioners demonstrates a causal relationship between the government's failure to prosecute Montuoro and the harm that petitioners have allegedly suffered—defamation of character. Nor would a successful prosecution of Montuoro—a speculative outcome at best—vindictate that harm. Indeed, petitioners acknowledge (Pet. 22) that "the vindication and the ultimate remedy that Petitioners seek," as the court of appeals put it (Pet. App. 11a), is "public vindication for a private wrong." Petitioners are therefore in precisely the same position as the plaintiffs in *Linda R.S.* and *Leeke*, who also were

victims of alleged misconduct who also would not obtain redress from a criminal prosecution of the persons allegedly responsible for the plaintiffs' injuries.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]In addition, it is also clear, for the reasons stated in the district court's opinion, that the federal courts lack the inherent authority to grant petitioners' application and that no statute confers on the federal courts the power to appoint an independent prosecutor. Moreover, any such appointment would present serious constitutional questions under the Appointments Clause of the Constitution, Article II, § 2, Cl. 2, the Enforcement Clause, Article II, § 3, and the doctrine of separation of powers. See, *e.g.*, *Heckler* v. *Chaney*, slip op. 10-11; *Buckley* v. *Valeo*, 424 U.S. 1, 118-141 (1976); *Nathan* v. *Smith*, 737 F.2d at 1078-1079 (Bork, J., concurring). Accordingly, the district court correctly held that the decision whether Montuoro should be investigated or prosecuted rests entirely within the prerogative of the Executive Branch and not with the federal courts.